APPENDIX A.

Affidavit of Leopold Weiner on First Count.

No. 1-1877-64

First Count.

Commonwealth of Pennsylvania
County of Philadelphia } ss.:

Leopold Weiner, being duly sworn according to law deposes and says that he is Secretary of Safeguard Mutual Insurance Company formerly known as Safeguard Mutual Fire Insurance Company, that the said company is a Pennsylvania Corporation duly constituted to engage in the insurance business, that the company's home office is 342-44 North Broad Street, Philadelphia, Pennsylvania, and that it has no other offices or places for the conducting of its business within or without the Commonwealth of Pennsylvania and that it has no place of business, or agent, in the State of New Jersey, that it has not authorized the State of New Jersey Department of Banking and Insurance nor any other division or subdivision of the State of New Jersey, to accept service of process on its behalf, that it is not doing business within the State of New Jersey, that the acts complained of by the plaintiff in its Complaint all occurred within the State of Pennsylvania, and no act of the defendant occurred within the State of New Jersey, and that the defendant is not subject to Chapter 320 of the Laws of 1962 of the State of New Jersey, nor is it subject to

any other Laws of the State of New Jersey which would grant your Honorable Court jurisdiction over the defendant, and further, there is no Federal Law or Rule of Civil Proceedings, which could be applied in the instant matter to grant your Honorable Court jurisdiction over the defendant. The bond upon which the plaintiff's suit is based, was issued by the defendant, at its home office at 342-44 North Broad Street, Philadelphia, Pennsylvania, and delivered to Bud Smith, who resides in Pennsylvania and who is employed by B. Smith Electric Company, Inc., a Pennsylvania corporation. The defendant had no knowledge that the said bond would be delivered or used outside of Pennsylvania.

/s/ LEOPOLD WEINER,
Leopold Weiner.

Sworn and subscribed before me this 24th Day of November, 1964.

/s/ MELVIN WEINER,
Notary Public.
Philadelphia, Phila. Co., Pa.
My commission expires April 8, 1968.

APPENDIX B.

Affidavit of Leopold Weiner on Second Count.

No. L-1877-64.

SECOND COUNT.

LEOPOLD WEINER, being duly sworn according to law deposes and says that he is Secretary of Safeguard Mutual Insurance Company formerly known as Safeguard Mutual Fire Insurance Company, that the said company is a Pennsylvania Corporation duly constituted to engage in the insurance business, that the company's home office is 342-44 North Broad Street, Philadelphia, Pennsylvania, and that as of June 30, 1964, Safeguard Mutual Insurance Company had admitted assets of $881,601.99 and liabilities of $356,060.88, making its net assets the sum of $525,541.01, which sum is more than sufficient to satisfy any judgment that could be entered against it in this matter.

/s/ LEOPOLD WEINER.
Leopold Weiner.

Sworn and subscribed: before me this 30th day of November, 1965.

/s/ MELVIN WEINER,
Notary Public.
Philadelphia, Phila. Co., Pa.
My Commission expires April 8, 1968.

APPENDIX C.

SUPERIOR COURT OF NEW JERSEY
LAW DIVISION.
Camden County.

Docket No. L 1877-64.

CIVIL ACTION.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, A BODY CORPORATE AND POLITIC OF THE STATE OF NEW JERSEY,

Plaintiff,

v.

B. SMITH ELECTRIC CO., INC., A CORPORATION, AND SAFEGUARD MUTUAL INSURANCE CO., A CORPORATION, JOINTLY, SEVERALLY, AND IN THE ALTERNATIVE,

Defendants.

ON MOTION OF DEFENDANT SAFEGUARD MUTUAL INSURANCE COMPANY FOR SUMMARY JUDGMENT OR FOR AN ORDER DISPENSING WITH REQUIREMENT FOR DEPOSIT OF SECURITY.

Order.

The above matter coming on to be heard in the presence of Martin F. McKernan, Esquire, attorney for the plaintiff, and Anthony M. Bezich, Esquire, of Supnick and Bezich, Esquires, attorneys for defendant, Safeguard Mutual In-

surance Company, on a motion made by the said defendant for an order for Summary Judgment, or Judgment on the Pleadings, or for an order dismissing the Complaint on the grounds that said defendant has not done any of the acts enumerated in subsection (a) of R. S. N. J. 17:51-1 to render said defendant subject to service of process through the Commissioner of Banking and Insurance of the State of New Jersey in the manner by said statute made and provided, or in the alternative for an order dispensing with the requirement of said statute that said defendant deposit with the clerk of this court cash or securities or bond with good and sufficient sureties to secure the payment of any final judgment which may be rendered in this action, and the Court having read and considered the affidavits herein filed, and having heard and considered the arguments of counsel for the respective parties, it is on this 23rd day of December, 1964;

ORDERED that the motion of said defendant Safeguard Mutual Insurance Company for summary judgment, or judgment on the pleadings, or for an order dismissing the complaint, be and the same is hereby denied, and it is further

ORDERED that the motion of said defendant, Safeguard Mutual Insurance Company for an order dispensing with the requirement that said defendant deposit with the clerk of this court cash or securities or a bond with good and sufficient sureties in an amount sufficient to secure the payment of any final judgment which may be rendered in this action be and the same is hereby denied, and it is further

ORDERED that said defendant, Safeguard Mutual Insurance Company shall, before filing its answer as hereinafter provided, deposit with the clerk of this court the sum of $15,000.00 in cash or securities, or file with said clerk a

bond in the said amount, with good and sufficient sureties, to secure the payment of any final judgment which may be rendered in this action against the said defendant, and it is further

ORDERED that said defendant Safeguard Mutual Insurance Company shall serve and file its Answer to the complaint of the plaintiff herein filed within 30 days of the date hereof.

/s/ ANTHONY C. MITCHELL,
J. C. C.
T. A.

Entry of the above Order is hereby consented to as to form.

SUPNICK AND BEZICH,

By /s/ ANTHONY M. BEZICH,
Attorneys for Defendant Safeguard Mutual Insurance Company.

APPENDIX D.

Pretrial Order.

FIRST COUNT.

1. This is a contract action where the plaintiff seeks to recover on a contractor's surety bond.

2. None.

3. Defendant, Safeguard Mutual Insurance Co., was the corporate surety guaranteeing the bid of deft., B. Smith Electric Co. Inc. Smith offered to perform the electrical work for John F. Kennedy Towers, in the amount of $106,830.00. The Bid Bond accompanying Smith's bid, was in the amount of $11,000.00. Smith's bid was the lowest bid and was accepted by plf. By the terms of the bid, Smith obligated itself to enter into a contract with plf. for the performance of the said electrical work and also obligated itself to furnish, together with its executed contract, a Performance and Payment Bond in the form required by Plf. Smith, after having been awarded the contract, could not procure or produce the necessary Performance and Payment Bond in the form required by the plf., under the contract documents and under the applicable statutes of the State of N. J. for that reason, plf. was obliged to re-advertise for bids for said electrical work and the lowest bid received thereafter was in the amount of $122,500.00, which was accepted by plf., and the contract in that amount was awarded on Sept. 11, 1964. The difference between the bid of deft., Smith, and the amount which plf. was eventually required to pay under the subsequent bid, was $15,670.00. No part of that money was ever recovered from Smith and plf. therefore demands judgment against deft. Safeguard in the amount of its bond or $11,000.00.

4. Defendant, Safeguard Mutual Insurance Co. contends it issued a bid bond accompanying the bid of deft. B. Smith Elc. Co., for electrical work; that Safeguard would issue a Performance Bond as per the terms of the Bid. The Housing Authority awarded the contract to B. Smith with knowledge that the Bid Bond accompanying the Bid was not within the terms of the Bid and specifications, i.e., that the Bid Bond was issued by an Insurance Co. not authorized to do business within the State of N. J. Safeguard issued a Performance and Payment Bond in accordance with the terms of their Bid Bond that accompanied the Bid of B. Smith and tendered same to the Housing Authority on July 16, 1964. The Performance and Payment Bond issued by the deft., Safeguard, guaranteed to the Housing Authority that all labor, material and performance pursuant to contracts executed on July 14, 1964, between the Housing Authority and B. Smith would be done. The Performance and Payment Bond was rejected by the Housing Authority because Safeguard was not authorized to do business in the State of N. J. and the Performance and Payment Bond was not in form prescribed by the specifications. Deft., Safeguard, further contends that the readvertised bid for electrical work was not the same as the original invitation for Bid. The readvertised invitation for Bid included additional requirements from the bidder.

5. The plf. demands damages in the sum of eleven thousand dollars ($11,000.00) together with interest.

6. None.

7. Contract, Breech of contr., damages. Does Judgment obtain against B. Smith preclude action against deft. Safeguard.

8. None.

9. Specifications for the construction of John F. Kennedy Towers, particularly specifications and instruction to bidders.

b—Bid of deft., B. Smith; and

c—Surety Bond of deft., Safeguard.

10. Not applicable.

11. No limitation.

12. Counsel will supply a memorandum to the court at the time of trial.

13. Usual order.

14. None.

15. Martin F. McKernan for the plf.
Anthony M. Bezich for the deft.

16. Two days.

17. To be fixed.

HON. JUDGE WILLIAM E. PEEL, *JDC*.
/s/ WILLIAM F. PEEL.

/s/ MARTIN F. MCKERNAN, ESQ.
/s/ ANTHONY M. BEZICH, ESQ.

APPENDIX E.

Opinion of the Court.

The Court: All right. Now, if I could have those Exhibits, gentlemen, please. I think it best there will be no dispute as to facts. This being the facts presented by the plaintiff in the plaintiff's case, by oral testimony and the several Exhibits which have been marked into evidence, it is not necessary that the Court find any facts. The matter is solely now a legal matter, and insofar as a recital for those facts to be explained, the Court's decision may be in order.

However, it appears that the Housing Authority of the City of Camden have become desirious of constructing a Senior Citizens Housing Project under and by authority of the Federal statute, undertook to have plans and specifications prepared for the same, known as the John F. Kennedy Towers.

As a result of that, a public advertisement was inserted in the Courier Post, a newspaper circulating in the City of Camden, which notice has been introduced into evidence as Exhibit P-2. That notice amounted to an invitation to bid, not only for the electrical work, which we are concerned with, but the various other phases of the construction of this project.

The significant part of that notice is that which directs the interested parties as to where they can find the plans and specifications, and, briefly, what is going to be required of them.

The entire specifications were not published, and they are not required to be published under the law. The reason is quite obvious. The expense would be tremendous. The

specifications, which are P-1 in evidence, are quite a large bound volume, probably as thick as the Philadelphia or Manhattan telephone directory, which is some inch and a half, two inches, thick. Those specifications contain the pertinent data with respect to the manner or method of bidding, which has been testified to.

They set forth the form of the bid bond, they set forth the form of the payment and performance bond.

The form of the performance bond, in dispute here, is the identical form set forth in the statute of New Jersey, to which every public body must adhere to. Substantially, substantially means just what the word implies. Without any big deviation. In addition to that, the plaintiff has the right to specify, as it did, that the exact language shall be in the form of the bond required in this case.

And, certainly, that would be the wisest course in any event.

B. Smith Electric Company undertook to furnish a bid in the amount of a hundred and six thousand eight hundred and thirty dollars for the electrical work, as shown by the Exhibit P-3.

At the same time, it submitted the bid bond, P-4, executed by the plaintiff and the defendant, Safeguard Mutual Insurance Company.

Now, the bid form is a form which was incorporated in the specifications, and, among other things, acknowledges that the bidder has familiarized himself with the form of an ultimate contract to be executed, and the form of payment and performance bond already in dispute. There were six other bidders for the electric work. Smith was the lowest. On June 18, 1964, at a regular meeting of the plaintiff, they accepted the bid of Smith, subject to approval of its counsel and the Public Housing Administration. Counsel approved the bid, and it was then sent to the Publice Housing Administration, and likewise approved.

On or about July 14, B. Smith was notified of the approval. He submitted an executed contract, P-5 in evidence, together with form of bond, P-6.

The bond was not in the statutory form, either verbatim or substantially, and so found as a matter of law neither was it in the form of course of the form required by the specifications because the specifications, as has been said before, required that the exact wordage of the statute be employed.

Thus, at this point, Smith did not comply with his bid, and at this point a default in fact occurred.

From the evidence that it appears that plaintiff gave Smith an opportunity to correct this default by obtaining a bond, the required form, as none was forthcoming, and at a meeting in August, I believe, the record shows that it was August 6, 1964, the award of the contract to Smith was rescinded and the bid of Coffey and Coyle, I think the next lowest responsible bidder, be accepted, subject to the approval of counsel and the Public Housing Administration, as indicated by the Resolution P-8 in evidence.

It appears from the testimony that the Public Housing Administration would not approve the acceptance of that bid because it was excessive, and directed that the Plaintiff re-advertise.

In accordance with that direction, plaintiff did readvertise. The re-advertisement being identical to the first advertisement, P-2, with exceptions that it invited bids only for the electrical work, and the identical same specifications, P-1.

Three bids were received, all lower than the Coffey and Coyle bid, which certainly indicated that the Public Housing Administration acted in good faith, and with knowledge.

You might reflect at this point because they had so ruled for damages as to B. Smith were mitigated because

the two bids came in for a hundred twenty-two thousand five hundred dollars, and a very proper method of selecting the successful bidder was employed, by the drawing of lots, and the contract was then awarded to a company by the name of Meade Electric, and they went on to finish the job.

So that the damages must be measured by the difference between the bid of B. Smith Electric at a hundred six thousand eight hundred thirty dollars and the bid of Meade for a hundred twenty-two thousand five hundred dollars.

However, the damages for which the defendant insurance company is liable cannot exceed the amount of the money, eleven thousand dollars, regardless of their mark, regardless of the actual resulting damage, which would prove to be in excess of the amount which in this case is due.

The defenses raised by the defendant in their pleadings and pre-trial is, the factual defenses, and have failed to materialize, and the legal arguments are without a substance.

The Court finds that the plaintiff acted in the only proper fashion it could. I find there is not the slightest deviation in their contract from the strict regulations of the law, or the specifications, and, B. Smith did not comply, and the failure of B. Smith to comply, and a default resulted which remained unpaid automatically entitled the plantiff to recover from the surety. Plaintiff does not have to show that it has been unable to collect from B. Smith, because collection is not a prerequisite.

In a matter of this sort, judgment will therefore be entered into in the amount of eleven thousand lollars in favor of the plaintiff and against the defendant, Safeguard Mutual Insurance Company, without interest, but with costs.

Is there anything further, gentlemen?

Mr. Bezich: That's it.

The Court: Bring the Jury down. Under the law, gentlemen, the Court must preserve the Exhibits until the time of appeal expires, and at the original appeal they will be preserved until the matter is disposed of on appeal.

(The Jury returns for dismissal.)

APPENDIX F.

Judgment and Mandate on Affirmance.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION.

APPEAL DOCKET NO. A-677-66.

CIVIL ACTION ON APPEAL.

HOUSING AUTHORITY OF THE CITY OF CAMDEN, A BODY CORPORATE AND POLITIC OF THE STATE OF NEW JERSEY,

Plaintiff-Respondent

v.

B. SMITH ELECTRIC CO., INC., A CORPORATION, AND SAFEGUARD MUTUAL INSURANCE CO., AN INSURANCE CORPORATION OF THE STATE OF PENNSYLVANIA,

Defendant-Appellant.

It is hereupon ordered and adjudged that the Judgment of the said Superior Court-Law Division-Camden County is affirmed with ..... costs; and that the record be remitted to the Superior Court - Law Division - Camden County to be there proceeded with in accordance with the rules and practice relating to that Court, consistent with the opinion of this Court.

WITNESS the Senior Judge of the Part, Superior Court of New Jersey, Appellate Division.
Judgment Entered: October 16, 1967
Mandate Issued: October 27, 1967

MORTIMER G. NEWMAN, JR.,
Clerk of the Superior Court.

APPENDIX G.

Order Denying Petition.

SUPREME COURT OF NEW JERSEY

C-79 SEPTEMBER TERM 1967.

ON PETITION FOR CERTIFICATION.

HOUSING AUTHORITY OF THE CITY OF CAMDEN,
Plaintiff-Respondent,

v.

B. SMITH ELECTRIC CO., INC., ET AL.,
Defendants-Petitioners.

To Appellate Division, Superior Court:

A petition for certification having been submitted to this Court, and the Court having considered the same,

It is hereupon Ordered that the petition for certification is denied with costs.

WITNESS the Honorable Joseph Weintraub, Chief Justice, at Trenton on the 12th day of December, 1967.

A TRUE COPY
JOHN H. GILDEA,
Clerk of the Supreme Court.

APPENDIX H.

Jurisdictional Provision of the United States Code.

§ 1257. State courts; appeal; certiorari

Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

(1) By appeal, where is drawn in question the validity of a treaty or statute of the United States and the decision is against its validity.

(2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States. June 25, 1948, c. 646, 62 Stat. 929.

APPENDIX I.

New Jersey Constructive Service Act.

PART 12. UNAUTHORIZED INSURERS

CHAPTER 51

SUBMISSION TO JURISDICTION OF STATE

Sec.

17.51-1. Acts in State by unauthorized insurers which constitute Commissioner attorney for service of process; service.

17:51-2. Actions against unauthorized insurers; deposit or bond required before insurer may file pleading.

17:51-3. Provisions inapplicable, when.

17:51-4. Partial invalidity.

17:51-5. Short title.

17:51-1. Acts in State by unauthorized insurers which constitute Commissioner attorney for service of process; service

(a) Any of the following acts in this State, by an insurer not authorized to transact business in this State: (1) the issuance or delivery of contracts of insurance to residents of this State or to corporations authorized to do business therein, (2) the solicitation of application for such contracts, (3) the collection of premiums, membership fees, assessments or other considerations for such contracts, or (4) any other transaction of business in relation to such contracts of insurance, is equivalent to and shall consti-

tute an appointment by such insurer of the Commissioner of Banking and Insurance and his successor or successors in office, to be its true and lawful attorney, upon whom may be served all lawful process and a complaint in any action or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contracts of insurance, and any such act shall be signification of its agreement that such service of process and a complaint is of the same legal force and validity as personal service of the same in this State upon such insurer.

(b) Such service of process and a complaint upon the commissioner shall be made by leaving two copies thereof, with the fee prescribed by law, in the hands of the commissioner or someone designated by him in his office, or in the following actions, by serving the same, as follows: (1) If the action is commenced in the County Court of any county other than Mercer county, then the sheriff or other authorized person, or (2) if the action is commenced in the county district court of any county other than Mercer county, then the clerk of the court may serve the commissioner by mailing such papers to him by registered mail, with the said fee. The commissioner shall forthwith mail by registered mail one of the copies of such process and complaint to the defendant at its last-known principal place of business, and shall keep a record of all papers so served upon him. The commissioner, upon giving notice to the defendant of the service of process as required by this act, shall file with the clerk of the court his certificate of the notice given. Such service of process and a complaint is sufficient, provided notice of such service and a copy of the papers are sent within ten days thereafter by registered mail by plaintiff or plaintiff's attorney to the defendant at its last-known principal place of business, and the defendant's receipt, or receipt issued by the post office with which the letter is

registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(c) Service of process and a complaint in any such action or proceeding shall in addition to the manner provided in subsection (b) of this section be valid if served upon any person within this State who, in this State on behalf of such insurer, is

(1) soliciting insurance, or

(2) making, issuing or delivering any contract of insurance, or

(3) collecting or receiving any premium, membership fee, assessment or other consideration for insurance; and a copy of such process and complaint is sent within ten days thereafter by registered mail by the plaintiff or plaintiff's attorney to the defendant at the last-known principal place of business of the defendant, and the defendant's receipt, or the receipt issued by the post office with which the letter is registered, showing the name of the sender of the letter and the name and address of the person to whom the letter is addressed, and the affidavit of the plaintiff or plaintiff's attorney showing a compliance herewith are filed with the clerk of the court in which such action is pending on or before the date the defendant is required to appear, or within such further time as the court may allow.

(d) No plaintiff shall be entitled to a judgment by default under this section until the expiration of thirty days from date of the filing of the affidavit of compliance.

(e) Nothing in this section contained shall limit or abridge the right to serve any process, complaint, notice or demand upon any insurer in any other manner now or hereafter permitted by law. L. 1952, c. 330, p. 1054, § 1; L. 1953, c. 17, p. 298, § 190.

17:51-2. Actions against unauthorized insurers; deposit or bond required before insurer may file pleading

(a) Before any insurer not authorized to transact business in this State shall file or cause to be filed any pleading or other paper in any action or proceeding instituted against it, such insurer shall either (1) deposit with the clerk of the court in which such action or proceeding is pending cash or securities or file with such clerk a bond with good and sufficient sureties, to be approved by the court, in an amount to be fixed by the court sufficient to secure the payment of any final judgment which may be rendered in such action; *provided, however,* that the court may in its discretion and after reasonable notice to the opposing party and upon a hearing make an order dispensing with such deposit or bond where the insurer shows to the satisfaction of the court that it maintains, in a State of the United States, funds or securities, in trust or otherwise, sufficient and available to satisfy any final judgment which may be entered in such action or proceeding; or (2) procure a certificate of authority to transact the business of insurance in this State.

(b) Nothing in subsection (a) of this section is to be construed to prevent an insurer not authorized to transact business in this State from making a motion for summary judgment, or judgment on the pleadings, or to dismiss the complaint on the ground either (1) that such insurer has not done any of the acts enumerated in subsection (a) of section one, or (2) that the person on whom service was

made pursuant to subsection (c) of section one was not doing any of the acts therein enumerated. L. 1952, c. 330, p. 1056, § 2; L. 1953, c. 17, p. 300, § 191.

17:51-3. Provisions inapplicable, when

The provisions of this act shall not apply to any action or proceeding against any unauthorized insurer arising out of a contract of

(a) Reinsurance effectuated in accordance with the laws of New Jersey;

(b) Insurance effectuated in accordance with chapter four hundred sixty-two of the laws of one thousand nine hundred and forty-eight;

(c) Aircraft insurance;

(d) Insurance on property or operations of railroads engaged in interstate commerce;

(e) Insurance against legal liability arising out of the ownership, operation or maintenance of any property having a permanent situs outside of this State; or

(f) Insurance against loss of or damage to any property having a permanent situs outside this State; where such contract contains a provision designating the commissioner of insurance to be its true and lawful attorney upon whom may be served all lawful process in any action or proceeding instituted by or on behalf of an insured or beneficiary arising out of any such contract or where the insurer enters a general appearance in any such action or proceeding. L. 1952, c. 330, p. 1057, § 3; L. 1953, c. 17, p. 301, § 192.

17:51-4. Partial invalidity

If any section, subsection, subdivision, paragraph, sentence or clause of this act is held invalid or unconstitutional, such decision shall not affect the remaining portions of this act. L. 1952, c. 330, p. 1058, § 4.

17:51-5. Short title

This act shall be known as the Unauthorized Insurers' Process Act. L. 1952, c. 330, p. 1058, § 5.

APPENDIX J.

Section 1 of the Fourteenth Amendment to the United States Constitution.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.